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No. 01-1472

Supreme Court, U.S.
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In The

Supreme Court of the United States

FLORIDA DEPARTMENT OF INSURANCE,

Petitioner,

v.

CHASE BANK OF TEXAS NATIONAL ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER FLORIDA DEPARTMENT OF INSURANCE SUPPLEMENTAL BRIEF

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QUESTION PRESENTED

Whether under proper principles of federalism the question of the standing of the Florida Department of Insurance under the receivership laws of Florida should have been certified to the Supreme Court of Florida as authorized by the Florida Constitution, Statutes, and Rules of Court.

INTERESTED PARTIES

Petitioner. Florida Department of Insurance, Domiciliary Receiver of Western Star Insurance Company, Ltd., an Antigua corporation.

The California Department of Insurance, Ancillary Receiver of Western Star, filed an *Amicus* Brief in support of Florida's appeal and an *Amicus* Brief in support of Certification and Rehearing.

Respondent. Chase Bank of Texas National Association, f/k/a Texas Commerce Bank National Association, f/k/a Ameritrust of the Texas National Association.

Chase is wholly owned by J. P. Morgan & Chase Co., which is publicly traded on the New York Stock Exchange.

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I. Supplemental Brief Filed Pursuant to Supreme Court Rule 15

The Petition for Certiorari was filed on April 2 and docketed on April 8, 2002. On April 16, 2002, the Governor of Florida signed legislation effective July 1, 2002, directly relating to the standing of the Florida Department of Insurance as Receiver. The Question Presented by the Petitioner argued, under principles of federalism, that the Fifth Circuit should have certified the question of Florida's standing to the Florida Supreme Court. Petitioner claimed standing existed under the present Florida statutes. The express purpose of the amendment was to clarify that the Florida Department of Insurance as receiver of an insolvent insurance company has had and does have standing over the claims such as brought in the case at bar. Petitioner's Supplemental Brief is filed under Supreme Court Rule 15.8.

The Florida Supreme Court previously had recognized that the issue of the Department of Insurance standing as receiver/liquidator was of great public importance and that there was no controlling precedent by Florida courts. *See Gee v. Seidman*, 653 So.2d 384, 385 (Fla. 1995). The new legislative enactment underscores why this Court under principles of federalism should grant certiorari and provide for certification of the Requested Questions to the Florida Supreme Court.

II. Clarifying Amendments to Florida Statutes Chapter 631 – Recognition of Federalism

The legislative staff analysis makes clear that the intent of the Florida legislature in passing the amendments to Chapter 631 was to clarify the pre-existing rights of the Department of Insurance as receiver and not to create new substantive causes of action. This analysis recognizes protection of state rights under the federalism provided by the McCarran-Ferguson Act.

> Section 3. Substantially rewrites s. 631.001, F.S., the statement of the purpose of part I of ch. 631, F.S., to support revisions proposed by the bill. According to representatives with the department, the **revisions to this section are designed to clarify statutory interpretation and eliminate a number of spurious defenses** that have been raised against the Department over the years. The language of the "purposes" section forms the decisional basis for opinions on nearly every unsettled aspect of insurance insolvency. For example, language has been added to explain that the entire chapter is part of the "regulation of the business of insurance," a phrase designed to avoid any threat of Federal preemption by fitting within the specific language of the **McCarran-Ferguson Act**. The phrase "vital public interest and concern" will help give an expansive interpretation to the department's powers in delinquency proceedings and help **avoid Federal interference**. Also, **language is added to clarify that the department, as Receiver, has the authority to maximize recovery of assets on behalf of the policyholders, creditors, other claimants, and the estate. This provision is added to eliminate**

> **frivolous litigation which had challenged the department's right to bring such claims.** [Emphasis added]

Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 432 See *www.leg.state.fl.us/Session/index* (see staff analysis for SB 0432, "banking and insurance", p. 8; section 3.)

The purposes Section 631.001 prior to the amendment are set out in relevant part at pp. 4-5 of the Petition for Certiorari. The purposes section as amended by the April 16, 2002 legislation provides:

> 631.001 Title, construction, and purpose. –
>
> (1) This part constitutes and may be cited as the "Insurers Rehabilitation and Liquidation Act."
>
> (2) This part shall be liberally construed to effect the purposes of this part.
>
> (3) The purposes of this part, which are integral elements of the regulation of the business of insurance and are of vital public interest and concern, are to:
>
> (a) Protect the interests of policyholders, creditors, and other claimants and the public.
>
> (b) Provide a comprehensive scheme for administering insurer receiverships.
>
> * * *
>
> (e) Enhance the efficiency and economy of the liquidation process by clarifying the law to minimize legal uncertainty and litigation.
>
> (f) Establish a system to equitably apportion any unavoidable loss.

> (g) Administer insurer receiverships more efficiently on an interstate and international basis by facilitating cooperation between states and by extending the scope of personal jurisdiction over debtors of the insurer outside the state.
>
> (h) Maximize recovery of assets for the benefit of the insurer's estate; policyholders, creditors, and other claimants; and the public.

See Laws of Florida, Chapter 2002-25, § 631.001 (amended 4/2002), Enrolled 2002 Legislature CS for CS for SB 432, 1st Engrossed at *www.leg.state.fl.us/Session/index*, PDF document, p. 5; section 3.

The clarification of the Department's existing standing to pursue claims is expressly set out in the amendment:

> 631.3915 Actions for damages. – The department, in its capacity as administrator, receiver, or similar capacity, may pursue any actions for damages or other recoveries on behalf of the insurer's estate and the insurer's policyholders, creditors, and other claimants.

See Laws of Florida, Chapter 2002-25, § 631.3915 (newly enacted 4/2002), Enrolled 2002 Legislature CS for CS for SB 432, 1st Engrossed at *www.leg.state.fl.us/Session/index*, PDF document, p. 23.

The amendment also avoids conflicts with claims that are personal or unique to the claimant.

> 631.141 Conduct of delinquency proceeding; domestic and alien insurers –
>
> (6) The department may assert all rights belonging to third parties, including, but not

> limited to, policyholders, creditors, and other claimants, except to the extent an individual claim is personal and unique to the claimant and could not inure to the benefit of the estate or to policyholders, creditors, or other claimants.

See Laws of Florida, Chapter 2002-25, § 631.141 (amended 4/2002), Enrolled 2002 Legislature CS for CS for SB 432, 1st Engrossed at *www.leg.state.fl.us/Session/index*, PDF document, p. 15.

III. Clarifying Amendments Should be Considered in Interpreting the Current Statute and Demonstrates the Need for Certification to the Florida Supreme Court

The legislation recently passed into law by the Florida House and Senate confirms the prior finding by the Florida Supreme Court that the Department of Insurance's standing is a matter of great public importance to the State of Florida. The federalism issues recognized by the legislature serve to emphasize the need for certification. Whether remedial legislation is clarifying and interpretive or creates a new substantive cause of action is critical for determination of the statute's application to existing cases or prospective application. Under Florida law, remedial legislative provisions are applied to existing cases unless a "new cause of action" is created:

> We have recognized that the presumption in favor of prospective application generally does not apply to "remedial" legislation; rather, whenever possible, such legislation should be applied to pending cases in order to fully effectuate the legislation's intended purpose. *City of*

> *Orlando v. Desjardins*, 493 So. 2d 1027 (Fla. 1986). However, we have never classified a statute that accomplishes a remedial purpose by creating substantive new rights or imposing new legal burdens as the type of "remedial" legislation that should be presumptively applied in pending cases.

Arrow Air v. Walsh, 645 So. 2d 422, 424 (Fla. 1994)

In *Arrow Air*, the new Florida legislation created a new substantive cause of action for "retaliatory discharge [that] has never been recognized within this state." *Id.* at 424. Indeed, the Florida Supreme Court cited as authority three Florida Supreme Court cases that held that there was no cause of action for retaliatory discharge in Florida prior to the new legislation becoming law. In *Arrow Air* there could be no doubt that the legislature created a new cause of action and was not merely clarifying existing rights.

In the case at bar concerning the standing of the Florida receiver under Florida law, the Florida Supreme Court has ruled definitively that there is no controlling Florida precedent. *See Gee v. Seidman*, 653 So.2d 384, 385 (Fla. 1995). The legislative staff analysis of the amendments characterizes the position opposing Florida's standing as "frivolous litigation which had challenged the department's right to bring such claims." Although there can be no better and more authoritative interpretation of legislative intent than an amendment duly enacted into law, the legislative amendment is all the more reason why the standing issue should be certified to the Florida Supreme Court.

Florida as receiver claims standing under the existing statute. The proper court to authoritatively determine whether Florida as receiver has standing under the existing statute and whether the objections to Florida's standing raised by the Fifth Circuit opinion are frivolous or real, is the Florida Supreme Court. The only court that can authoritatively decide whether the amendments are interpretive and clarifying or create new substantive, non-procedural, rights is the Supreme Court of Florida.

IV. The Purpose of the Statutory Enactments and the Nature of Florida's Claims Warrant Certification as Matter of Sound Discretion

In considering the appropriations for the requested certification to the Florida Supreme Court, the claims of the receiver need to be placed in context with the purposes of the statute and the amendment. In the case at bar, the injuries to the policyholders are not "personal and unique" and would "inure to the benefit of the estate." The District Judge, A. Joe Fish, in the earlier ruling that the Florida Department of Insurance as receiver did have standing to pursue policyholder claims, ruled that the policyholder claims were not particularized, but rather were collective:

> Here, no policyholder or claimant has a particularized claim of fraud against Chase. The injury that each suffers is the same as all others: no monies available to pay their claims. While certainly the particular dollar amount of each claim will vary, there is nothing peculiar to any

> policyholder or claimant about the character of his damages.

App. B-12-13, Petition for Certiorari.

The Florida Department of Insurance as domiciliary receiver under the laws of Florida, and as the court appointed "Receiver" under the NAIC Trust claims standing: (1) to pursue breach of trust and fiduciary claims against the former NAIC trustee (now Chase) for the total loss of the $5.4 million Trust Fund Minimum and (2) to pursue fraud claims based upon false representations to members of the insurance community including surplus lines brokers and regulators that provided the insurance company with sufficient color of compliance with insurance laws that it was able to place policies and even after the California cease and desist order was issued to collect premiums, until ultimately placed in receivership by the State of Florida. The NAIC Trust was for the protection of "policyholders and third party claimants." The Fifth Circuit ruled the Florida Department had no standing under Florida law, which also was for the protection of "insureds, third party claimants, and the public."

In reference to the fraud count, reliance was **not** claimed on behalf of individual policyholders who probably never heard of the NAIC Trust much less read it as a precondition to buying the policy. Reliance could not be claimed and should not be required by the third party claimants (individuals who were injured by negligent acts of policyholders) because this class of claimants did not exist prior to the issuing of the policy. The proper party to pursue the fraud claims for false representations made to

brokers and regulators would **not** be individual policyholders and third party claimants. The proper party would be the Florida Department of Insurance as receiver. The existing Florida law is to be "liberally construed" to effectuate its purpose. Notwithstanding the express language stating this purpose, it was ignored by the Fifth Circuit in ruling there was no standing under Florida law to pursue the breach of trust and the fraud claims. The legislative amendment requires that the purpose of the present statute and of the amendment not be ignored.

The Florida legislative enactments recognize principles of federalism endorsed by the McCarran-Ferguson Act. The Fifth Circuit concerns about possible federal due process expropriation of individual claims against the trustee Chase does not arise in the present suit. Under the amendment to Section 631.141 (6), p. 4, *supra*, it will not occur in future receiverships. The dicta by the Fifth Circuit that federal courts would not have Article III standing or that constitutional standing should be denied on a "prudential basis" seems to be a diversionary excursion. The receiver's claims for money damages being pursued against the trustee (Chase) have no relevant comparison to *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Nevertheless, possible federal constitutional implications would be an important reason under federalism why the question of Florida's standing should be certified to the Florida Supreme Court. This Court has noted:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time,

> energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.

Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974); cited with approval by *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997).

Sound discretion would result in certification.

Respectfully submitted,

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